

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-11109-RGS

LEXINGTON INSURANCE COMPANY  
and  
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH

v.

VIRGINIA SURETY COMPANY, INC.

REPORT TO THE COURT OF APPEALS

August 22, 2007

STEARNS, D.J.

On May 3, 2007, this court issued an Order in which it granted in part defendant Virginia Surety Company, Inc.'s (Virginia Surety) motion for summary judgment, and denied the motion for summary judgment filed by plaintiffs Lexington Insurance Co. (Lexington) and National Union Fire Insurance Co. of Pittsburgh (National Union). On May 31, 2007, plaintiffs filed a Notice of Appeal with the Court of Appeals for the First Circuit. On August 10, 2007, the Court of Appeals issued an Order instructing this court to clarify the intended finality of its summary judgment decision.

On August 20, 2007, responding to a request by this court, the parties filed a joint submission in which they collectively agreed that the court's Order of May 3, 2007, did not constitute a final and appealable order. As the parties noted in the submission, the decision on summary judgment did not dispose of all issues to be decided in the case. For example, there remains a dispute over the amount of the damages owed to Virginia Surety, as well as a dispute as to the amount of prejudgment interest that is due. The parties

further indicated that they do not at this time wish to file a motion under Fed. R.Civ.P. 54(b) regarding the appealability of the May 3, 2007 Order.

The court agrees with the position taken by the parties in their submission. However, in light of the pending appeal, this court does not have jurisdiction to proceed. Should the Court of Appeals choose to remand the matter, the court will in due course schedule a Status Conference and, if the matter cannot be otherwise resolved, proceed to a final decision on all outstanding issues.

RESPECTFULLY SUBMITTED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE